



## **ASA 2020 Advocacy Accomplishments**

**State Chapter Visits:** ASA Government Relations Director Mike Oscar visited in person or met virtually with the following Chapters:

- Carolinas (Charleston and Midlands)
- Greater Baton Rouge
- Idaho
- Southwest Florida
- North Texas (Virtual)
- New Jersey (Virtual)
- Colorado (Virtual)
- Washington State (Virtual)

### **Congressional Visits:**

- Rep. Mo Brooks (R-AL)
- Rep. Garret Graves (R-LA)

### **Legislation:**

#### **H.R. 2344: Change Orders**

- Rep. Golden (D-ME) included this legislation as amendment to the House FY21 National Defense Authorization Bill, but it was not included in the final bill.
- This legislation is referred to as the Small Business Payment for Performance Act and is sponsored by Rep. Stauber (R-MN) and Veasey (D-TX) to compel agencies to be accountable for changed work they order by funding their own construction projects in a timely manner, instead of diverting that financial burden to the small contractors.

## **S. 1434 / H.R. 5644: Reverse Auction**

- S. 1434, the Construction Procurement Improvement Act passed the Senate unanimously on December 19, 2019. S. 1434, now H.R. 5644 was referred to the House Oversight and Reform Committee where it awaits consideration. This bipartisan bill would ban reverse auctions for federal construction contracts.
- This procurement method often favors businesses offering the lowest price, rather than those that are most qualified, they said. Reverse auctions can compromise quality, overlook small businesses, or even require a new bidding process down the road, eliminating any initial savings. Reverse auctions are ultimately inappropriate platforms for design-build contracts, which require design concepts, key personnel, and technical solutions to be incorporated into any successful final decision.
- If the bill is enacted, officials would be required to change the Federal Acquisition Regulation within 180 days. The U.S. Army Corps of Engineers implemented a similar ban on reverse auctions for construction projects. Army Corps officials “found their use of reverse auctions did not reduce costs in practice and that they are ill-suited to the variability and unpredictability that comes with construction projects.”

## **Federal Prison Industries (FPI)**

- Reps. Brooks (R-AL) and Huizenga (R-MI) have offered suggested legislative language:
  - Elimination of Mandatory Sourcing for Government Contracts
  - Elimination of Small Business Set-Asides for Federal Prison
  - Report To Congress: Not later than 180 days after the date of the enactment of this Act, after consultation with the Small Business Administration and the Secretary of the Department of Labor, the Attorney General shall report to Congress on the extent of which domestic markets Federal Prison Industries compete with domestic capacity in the private sector, including small business, and identify new markets overseas for Federal Prison Industries to begin to compete for in which there is no domestic capacity in the private sector, including small business. Such a report shall focus on the loss of revenue for FPI removing itself from domestic competition, and what percentage is needed in the respective overseas markets to make up for the loss of revenue from ceasing to compete domestically with the private sector, including small business. Such a report shall also focus on the development of an expedited timeline and the necessary action items needed for such a transition.
- On August 20, 2020, Kerrick Whisenant hosted Rep. Brooks on the above.

## **H.R. 6359: P3 Bonding Requirements on Transportation Projects**

- On June 30, 2020, the House voted on H.R.2, the Investing in a New Vision for Environment and Surface Transportation in America Act (INVEST), which would provide \$1.5 trillion into infrastructure spending. More than 350 amendments were filed with the INVEST Act.
- Despite our best efforts, H.R. 6359, legislation that would revise the transportation infrastructure finance and innovation program to require the Department of Transportation (DOT) to ensure that the design and construction of a project carried out under the program must have appropriate payment and performance security, regardless of whether the obligor is a state, local government, agency or instrumentality of a state or local government, public authority, or private party, was not included as an amendment to the INVEST Act. Our efforts helped secure Rep. Lynch (D-MA), author of H.R. 6359, a total of 7 bipartisan cosponsors - Chris Pappas (D-NH), Troy Balderson (R-OH), Daniel Webster (R-FL), Carolyn Maloney (D-NY), Steve Stivers (R-OH), Sharice Davids (D-KS), and Warren Davidson (R-OH).

- In terms of next steps – Our attention now turns back to the Department of Transportation to address the perception that this language would add unnecessary complexity to the TIFIA approval process.

#### **H.R. 5329: Freedom from Government Competition Act**

#### **H.R. 5247: SUBS Act – Bid Listing**

#### **S.4203: The American Infrastructure Bonds Act of 2020**

- Sponsored by Sens. Wicker (R-MS) and Bennet (D-CO), the legislation would create a new class of “direct-pay” taxable municipal bonds to help struggling governments finance critical public projects in the wake of the coronavirus pandemic. Similar to the “Build America Bonds (BABs)” that Congress created following the 2008 financial crisis, this legislation would improve upon the model of BABs and would allow state and local governments to issue taxable bonds for any public expenditure that would be eligible to be financed by tax-exempt bonds. These bonds could be used to support a wide range of infrastructure projects, including roads, bridges, water systems, and broadband internet. The bonds would be modeled as a “direct-pay” taxable bond, with the U.S. Treasury paying a percentage of the bond’s interest to the issuing entity to reduce costs for state and local governments.

#### **H.R. 6776: JOBS Credit Act**

- On June 12, 2020, ASA joined the International Franchise Association (IFA) in supporting bipartisan legislation to improve and enhance the Employee Retention Tax Credit (ERTC) program. This legislation is being sponsored by Murphy (D-FL) and Katko (R-NY). Building on the ERTC provision included in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136 (Section 2301)), the JOBS Credit Act would include a number of policy enhancements, such as:
  - An expansion of the credit percentage from 50 percent to 80 percent of qualified wages;
  - An increase of the per-employee limitation from \$10,000 for all calendar quarters to \$15,000 per calendar quarter (and an aggregate of \$45,000 for all calendar quarters);
  - A phased-in credit, which will allow employers with more than a 20 percent decline in gross receipts to be eligible for a portion of the credit; and
  - Improved coordination between the ERTC and the Paycheck Protection Program so employers can be eligible for both programs, but with guardrails in place to prevent “double dipping.”

**Congressional Caucus (Construction Procurement Caucus) Introduced on March 5, 2020:** ASA Founding Member

#### **Regulatory Actions:**

- On October 7, 2020, ASA sent a letter to Department of Labor Secretary Scalia regarding the interim final rule on the Independent Contractor Status Under the Fair Labor Standards Act.

- On Friday, September 25, 2020, Brian Carroll participated in the Small Business Administration Office of Surety Guarantees (SBAOSG)’s 50th Anniversary Conference.
- Federal Acquisition Regulation (FAR) Payment Bond Increases
  - On August 31, 2020, ASA, along with the Construction Industry Procurement Coalition (CIPC), submitted comments against the increase of payment bond threshold from \$35,000.00 to \$40,000.00. Initially, we were asked by the surety folks to lead this effort against the Federal Acquisition Regulation (FAR)’s payment bond increases; however, we strategically decided that it would be best to lead this effort under the CIPC umbrella.
  - On August 31, 2020, OSHA issued another final rule related to beryllium in construction and ASA worked to include in the rulemaking’s Frequently Asked Questions (FAQ) page that “exposure to rock, soil, concrete, and brick at the typical construction site will not result in beryllium exposure above the action level under foreseeable conditions,” and thus such operations would not be covered by the rule.

## **COVID-19:**

### **Member Resources:**

- i. COVID-19 web page
- ii. COVID-19 resource page
- iii. COVID-19 Employer Guide
- iv. Attorneys Council Legal Guidance
- v. ASA Guide to the Families First Coronavirus Response Act Leave Provisions
- vi. ASA CARES Act SBA Loan Program Summary
- vii. CISC COVID-19 Exposure Prevention Preparedness, and Response Plan (English and Spanish)

### **Advocacy Correspondences:** The ASA signed onto the following letters related to COVID-19

- viii. A coalition letter to Congressional Leadership requesting their continued support for Fixing America’s Surface Transportation (FAST) Act, expiring on September 30, 2020. This legislation provides a one-year extension for current surface transportation law with increased investment levels, along with \$37 billion for state departments of transportation and \$32 billion for public transit agencies.
- ix. A letter in conjunction with the AGC, the International Franchise Association, and more in sending a letter to congressional leadership requesting the expansion of “second draw” Paycheck Protection Program (PPP) loans for small businesses.
- x. A Small Business Legislative Council (SBLC) letter to Congressional Leadership conveying business-focused proposals to be included in a new round of COVID-19 relief.
- xi. An SBLC letter supporting the Small Business Expense Protection Act, which would ensure that small businesses can deduct eligible expenses paid with a forgiven Paycheck Protection Program (PPP) loan from their taxes.
- xii. A Construction Industry Safety Coalition (CISC) letter to the Senate Health, Education, Labor, and Pension (HELP) Committee leadership expressing concern for proposals to compel OSHA to issue an emergency temporary for infectious diseases
- xiii. An SBLC letter to Congressional Leadership urging them to take action to modify the PPP loan program
- xiv. A coalition letter urging President Trump to support investments in infrastructure in the wake of COVID-19

- xv. ASA spearheaded a letter signed by 15 organizations to the Attorney General recommending the Department of Justice temporarily suspend operations by the Federal Prison Industries.
- xvi. A CISC letter seeking OSHA guidance on the reportability of COVID-19 cases and recommending an approach to social distancing and face coverings in construction.
- xvii. An SLBC letter urging Congress to allocate additional funds to the PPP program and EIDL Program along with extending eligibility to 501©6 organizations
- xviii. A SFAA-NASBP letter to Congressional Leadership on the need for emergency action regarding the acceptance of electronic bonds.
- xix. A CISC letter encouraging the issuance of exemptions for operations and maintenance of essential infrastructure during COVID-19.
- xx. ASA issued a Gubernatorial Statement on keeping the construction industry an essential service. **NOTE:** ASA ran a Voter Voice Advocacy campaign, and 1,399 ASA members sent the Gubernatorial Statement to 38 Governors across the country.

## **Attorneys Council Accomplishments:**

### **Attorneys' Council**

- ASA Staff conducted 3 Full Council Meetings in 2020:
  - In person Attorneys' Council meeting at SUBExcel 2020 in Las Vegas
  - Virtual Attorneys' Council meeting in June
  - Virtual Attorneys' Council meeting in October
- Attorneys' Council webinars
  - ASA Webinar on Return to Work protocol in May
  - Council members presented on multiple webinar topics throughout the year, including Effective Contract Negotiations, Integrated Project Delivery, Practical Considerations with Coronavirus, and Prompt Payment Clauses
- Resource Documents
  - The Attorneys' Council has undertaken the updating of several documents and resources for the ASA community in 2020
  - ASA Subcontract Document Suite and Subcontractor Negotiating Tips
  - ASA Retainage Law in 50 States resource
  - Began work on new ASA resource document to compile Pay If Paid legislation by state

### **Contract Documents Task Force**

- Contract Documents Task Force completed the following review and approvals in 2020:
  - Lean Design-Build Addendum (ConsensusDocs 431)
  - Performance Bond Document suite
  - Prefab Contract Document

## **Subcontractors Legal Defense Fund**

- Revised application process undertaken and approved by the Council to ensure timely processing of requests for support
- Major victory in the *Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America* pay when paid case in California, limiting enforcement of the clauses when they unnecessarily delay payments to Subcontractors.
- New and pending cases:
  - Snake Steel, Inc. (Tennessee Prompt Payment case) - approved
  - Skanska USA Building (Michigan commercial general liability case) – declined
  - State Construction (Washington lien and bond claims case) - approved
  - Eastern Steel (Effects of arbitration agreement on surety obligations) – declined
  - KB Home (Subcontractor lien claim) - declined
- Fundraising Efforts continue to replenish SLDF finances
  - Voluntary contribution included in registration for SUBExcel
  - 2020 SLDF Vegas fundraiser and sponsor contributions
  - SLDF included on ConsensusDocs webinar for voluntary contributions
  - Early 2021 Virtual Tasting Experience Fundraiser
  - Fundraising letter to previous donors to go out in January to raise funds and promote virtual fundraiser
  - Though fundraising has effectively halted since the pandemic, over \$20,000 has been raised so far in 2020. Renewed focus necessary as pandemic recovery begins in 2021.

## **Social Media:**

### **Facebook**

- 1,418 people like the ASA Facebook page, up from 1,312 likes from September 2019
- 1,943 people follow the page up from 1,773 followers in September 2019
- The most popular posts contain a photos of ASA Staff/members engaging with members of Congress.
  - The September 24<sup>th</sup> post about Brian Carroll participating in the SBA's Surety Program 50th Anniversary Conferencereceived over 500 views
  - The August 20, 2020 post of Rep. Brooks' (R-AL) tour of Claborn Manufacturing, arranged by Kerrick Whisenant, received over 2,000 views, and was shared 8 times, including by Rep. Brooks' office.
  - Our July 2<sup>nd</sup>, 2020 post thanking Rep. Golden (D-ME) for attaching our change orders legislation as amendment to the FY 21 NDAA received over 600 views
  - Two posts about our SLDF victories from Spring of 2020 received over 500 views
  - Social media posts about COVID-19 and PPP resources also were routinely hitting over 400 views
  - The shared ASA Gubernatorial Statement on Keeping Construction an Essential Service was viewed 1,134 times

### **Twitter**

- 3,248 followers, up from 2,307 in September of 2019.